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U.S. DISTRICT COURT
N.D. OF ALABAMA

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

CARLA MANCIL, as mother and next friend of)
JOSHUA MANCIL, a minor)
)
Plaintiff,)
)
v.) CV-07-P-0922-M
)
NINTENDO OF AMERICA INC.)
)
Defendant.)

ANSWER

COMES NOW Defendant, Nintendo of America Inc. ("Nintendo"), by and through its attorneys, and answers Plaintiff's Complaint, and each and every count and claim therein, separately and severally, as follows:

Mancil v. Nintendo of America, Inc

NATURE OF ACTION

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1. Admitted that this is the nature of Plaintiff's allegations.

2. Admitted on information and belief that Plaintiff, Carla Mancil, is an adult resident of Etowah County, but denied in all other respects.

3. Admitted on information and belief that Plaintiff was an adult resident of Etowah County, Alabama at all times material to this Complaint, but denied in all other respects.

4. Denied that jurisdiction and venue are proper in the Circuit Court of Etowah County, Alabama.

5. Admitted that Nintendo is a Washington corporation doing business in Alabama, and that its principal place of business is Redmond, Washington.

6. Nintendo denies the material averments of Paragraph Six and demands strict proof thereof.

7. Admitted that Nintendo distributed and sold the video game "Zelda II: The Adventure of Link," but denied in all other respects.

8. Admitted that Nintendo marketed, distributed and sold the video game "Zelda II: The Adventure of Link" in the United States, but denied in all other respects.

9. Denied.

COUNT ONE

9. Admitted that Nintendo distributed and sold the video game "Zelda II: The Adventure of Link," but denied in all other respects.[1]

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied that Plaintiff is entitled to any relief sought.

COUNT TWO

16. No response required.

17. Denied.

18. Denied.

19. Denied.

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[1] Plaintiff's Complaint contains two paragraphs designated as Paragraph Nine. Defendant's Answer reflects Plaintiff's numbering.

20. Denied.

21. Denied.

22. Denied that Plaintiff is entitled to any relief sought.

COUNT THREE

23. No response required.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied that Plaintiff is entitled to any relief sought.

COUNT FOUR

30. No response required.

31. Denied.

32. Denied.

33. Denied.

34. Denied that Plaintiff is entitled to any relief sought.

COUNT FIVE

35. No response required.

36. Admitted that Nintendo distributed and sold the video game "Zelda II: The Adventure of Link," but denied in all other respects.

37. Nintendo avers that it does not understand the allegations of Paragaph Thirty-Seven as phrased, as it is not clear to what "these parts" refers. Interpreting "these parts" to refer to the component parts of the video game "Zelda II: The Adventure of Link," Nintendo admits

that the software incorporated into that video game contains code which will produce images when combined with a Nintendo Entertainment System game console and displayed on a television, but denies the material averments of Paragraph Thirty-Seven in all other respects.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied that Plaintiff is entitled to any relief sought.

AD DAMNUM CLAUSE

Denied that Plaintiff is entitled to any relief sought.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff's Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

Defendant denies the material allegations of Plaintiff's Complaint, and demands strict proof thereof.

THIRD DEFENSE

Defendant avers that Plaintiff's claims are barred by the rule of repose, the applicable statute of limitations and the doctrines of laches and estoppel.

FOURTH DEFENSE

Defendant avers that venue is improper, or that another venue is more convenient.

FIFTH DEFENSE

Defendant avers that Plaintiff and her minor child were guilty of contributory negligence and that this negligence proximately caused or contributed to cause the alleged injuries and damages.

SIXTH DEFENSE

Defendant denies that any conduct on its part was the proximate cause of the claimed injuries.

SEVENTH DEFENSE

Defendant denies that Plaintiff or her minor child were injured or harmed in any way by any alleged act or omission by Defendant or its agents.

EIGHTH DEFENSE

Defendant denies that its conduct was in any manner negligent, wanton or consciously indifferent.

NINTH DEFENSE

Plaintiff and her minor child had full knowledge of, accepted, and assumed all risks and possible adverse affects related to the use of the product at issue in this action. Plaintiff's recovery, therefore, is barred, diminished, reduced, or offset under the principles of assumption of the risk and/or informed consent.

TENTH DEFENSE

Defendant avers that Plaintiff or her minor child misused the subject video game, or component parts thereof, and such misuse was the proximate cause of his injuries.

ELEVENTH DEFENSE

Defendant denies that it breached any warranty allegedly owed to Plaintiff or her minor child, either express or implied.

TWELFTH DEFENSE

Defendant denies that it had the opportunity to cure any of the alleged defects in the product and specifically denies Plaintiff allowed such an opportunity, thereby precluding Plaintiff from recovering against Defendant for breach of warranty.

THIRTEENTH DEFENSE

Plaintiff's breach of warranty claims are expressly limited by and subject to the remedies and exclusions set forth in the written warranties provided with the product at issue in this case.

FOURTEENTH DEFENSE

Defendant avers that it did not fail to warn Plaintiff or her minor child and that Plaintiff and her minor child failed to heed any and all warnings.

FIFTEENTH DEFENSE

Plaintiff's implied warranty claims are barred in whole or in part due to a lack of privity between Plaintiff or her minor child and Defendant.

SIXTEENTH DEFENSE

Plaintiff's implied warranty claims are barred in whole or in part because the subject product was a used product to which implied warranties are not applicable under Alabama law.

SEVENTEENTH DEFENSE

Defendant avers that the dangers alleged by Plaintiff and her minor child were open and obvious.

EIGHTEENTH DEFENSE

Plaintiff's claims are barred in whole or in part because of the independent, intervening and superseding negligence of third parties over whom Defendant had no control and with respect to whom it has no legal responsibility or liability.

NINETEENTH DEFENSE

Plaintiff's claims are barred in whole or in part to the extent that the product referred to in the Complaint was altered, changed, or modified after the product left the possession, custody and control of Defendant.

TWENTIETH DEFENSE

Plaintiff's claims or causes of action are barred in whole or in part because the product allegedly at issue conformed to the then-existing state of the art with respect to design, manufacture, sale and distribution, including disclosure of appropriate precautionary information regarding use, handling and care of such products.

TWENTY-FIRST DEFENSE

Plaintiff's claims and causes of action are barred in whole or in part because the alleged risks and dangers associated with the product at issue was not known, knowable, or foreseeable.

TWENTY-SECOND DEFENSE

Plaintiff's claims and causes of action are barred in whole or in part because the alleged injuries, if any, may have been caused by, or were the result of, a pre-existing injury or condition.

TWENTY-THIRD DEFENSE

Plaintiff's claims and causes of action are barred in whole or in part because Plaintiff and her minor child failed to mitigate their damages, if any, despite full knowledge of them.

TWENTY-FOURTH DEFENSE

Plaintiff's claims are barred in whole or in part because the subject product was not defective within the meaning of the Alabama Extended Manufacturer's Liability Doctrine.

TWENTY-FIFTH DEFENSE

Defendant avers on information and belief that each item of economic loss alleged in the Complaint was, or with reasonable certainty will be, replaced or indemnified, in whole or in part by collateral sources.

TWENTY-SIXTH DEFENSE

Defendant avers that the product at issue was not defective within the meaning of the Alabama Extended Manufacturer's Liability Doctrine because of each of the following:

a) It had been altered or modified prior to the accident and was not in substantially the same condition at that time as when it left Defendant's possession and control.

b) The product was neither defective nor unreasonably dangerous.

c) The product was not unreasonably dangerous because it was not more dangerous than the ordinary user would have contemplated.

d) The manufacture and design of the product was well in keeping with the state of the art at the time of the manufacture of the product.

TWENTY-SEVENTH DEFENSE

The Alabama Extended Manufacturer's Liability Doctrine, which in effect is the doctrine of strict liability and which Plaintiff contends is applicable to this case, is constitutionally void in that:

(a) It operates to create a conclusive presumption that is arbitrary, it operates to deny a fair opportunity on the part of the manufacturer and/or seller to rebut such conclusive presumption, and it acts to substitute judicial fiat in place of fact in judicial determination of an issue involving property of this Defendant with the result that:

(i) It deprives Defendant of property without due process of law contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and specifically to those portions of the Constitution proscribing any state from depriving a person of property without due process of law; and

(ii) It deprives Defendant of property without due process of law contrary to Article I, Section 6, of the State of Alabama Constitution and specifically contrary to said provision of the Constitution of the State of Alabama providing that no person shall be deprived of property except by due process of law, with the result that the Plaintiffs are not entitled to recover in this cause against Defendant.

(b) It denies Defendant the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States and specifically contrary to that portion of the Fourteenth Amendment proscribing any state from denying "to any person within its jurisdiction equal protection of the laws" in that it discriminates against the manufacturer and seller in favor of other defendants in litigation for the reason that it imposes a higher duty upon the manufacturer and seller than was or is imposed upon other persons who are defendants under circumstances where the imposition of a higher duty upon the manufacturer and/or seller would amount to an unreasonable classification, and hence Plaintiffs are not entitled to recover against Defendant.

(c) The attempted imposition of strict liability in this case against Defendant operates to deny equal protection of law contrary to the provisions of the Constitution of the State of Alabama which require the state to afford all persons equal protection of law with the result that Plaintiffs are not entitled to recover against Defendant in this case.

TWENTY-EIGHTH DEFENSE

Plaintiff's Complaint fails to state any claim for which damages for mental anguish or emotional distress can be awarded.

TWENTY-NINTH DEFENSE

A jury award of mental anguish damages in this case will violate due process and equal protection rights guaranteed to Defendant by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 6 and 22 of the Constitution of the State of Alabama of 1901. In particular, a mental anguish award will violate these constitutional provisions because Alabama juries are given no rule, standard or guideline upon which to rely in calculating mental anguish damage awards.

THIRTIETH DEFENSE

The imposition of punitive damages against Defendant in this case based upon theories of respondeat superior, agency, vicarious liability, or joint and several liability violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

THIRTY-FIRST DEFENSE

Defendant cannot be held liable for punitive damages for intentional wrongful conduct or conduct involving malice based upon acts or omissions of any agent, employee, or servant pursuant to Ala. Code § 6-11-27 (Supp. 1991).

THIRTY-SECOND DEFENSE

The claims of Plaintiff for punitive damages and mental anguish against Defendant cannot be sustained, because an award of punitive damages or damages for mental anguish under Alabama law by a jury that (1) is not provided a sufficient standard for determining the appropriateness, or the appropriate size, of a such a damages award, (2) is not instructed on the limits on punitive damages or damages for mental anguish imposed by the applicable principles of deterrence, punishment and reasonableness, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status of the defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages or mental anguish damages that is vague and arbitrary as to damages permissible, and (5) is not subject to judicial review on the basis of objective standards, would violate Defendant's substantive and procedural due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clause of the Fifth Amendment as incorporated into the Fourteenth Amendment, and by the Alabama constitutional provisions providing for due process, equal protection, and guarantee against double jeopardy.

THIRTY-THIRD DEFENSE

Any award of punitive damages in this case would violate Defendant's rights under the substantive and procedural due process clause of the United States Constitution and of the Constitution of the State of Alabama; the excessive fines clauses of the Eighth Amendment to the United States Constitution; the contract clause of Article Two of the United States Constitution; and the equal protection clause of the United States Constitution and the Constitution of the State of Alabama.

THIRTY-FOURTH DEFENSE

Defendant avers that an award of punitive damages, if any, in this case is subject to the limitations set forth in Ala. Code § 6-11-21, as amended.

THIRTY-FIFTH DEFENSE

Defendant reserves the right to amend and/or supplement this Answer should discovery reveal other available defenses.

One of the Attorneys for Nintendo of America Inc.

OF COUNSEL:
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CERTIFICATE OF SERVICE

This is to certify that on this 16th day of May, 2007, a true and correct copy of the foregoing was served on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to

David F. Miceli
Simmons Cooper LLC
119 Maple Street, Ste 201
Carrollton, GA 30117

Of Counsel